

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

vs.

SIMI VALLEY UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH No.: N2005080763

**DECISION**

The hearing in the above-captioned matter was held on November 3, 4, 15, 16, and 17, 2005, at Simi Valley, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Student appeared through his parents, (Mother and Father) and counsel, Arlene Bell. Respondent Simi Valley Unified School District (District) appeared through its counsel, Andrew V. Arczynski.

Evidence was received, and the record held open so that the parties could submit written closing arguments. Student's Closing Argument is identified for the record as Exhibit AAAAAA. Respondent's Closing Statement is identified as Exhibit 41. There being no further briefing, the matter was submitted for decision on December 9, 2005.

The Administrative Law Judge hereby makes his findings of fact, legal conclusions, and orders, as follows.

**INTRODUCTION AND STATEMENT OF CASE**

Student is a resident within the Respondent District, and formerly attended a District elementary school, from kindergarten until approximately half-way through the fourth grade. His parents removed him from Knolls Elementary School (Knolls) a few weeks after the Christmas break, and began to home school him, with the assistance of an educational therapist. Thereafter, they requested an assessment to determine if he needed special

education services. That request was denied, although the District thereafter agreed to conduct assessments. In the months since then, Student enrolled in a non-public school, beginning in the fifth grade, the tuition being paid by his parents.

In this proceeding Student asserts that the District did not meet its “child find” obligations—did not take proper steps to identify him as eligible for special education—and it is further alleged he was not properly assessed to determine eligibility and needs. Student asserts that he is in fact eligible for special education services. If the issues are resolved in the Student’s favor, the family seeks relief including compensatory services and reimbursements for tuition paid to the non-public school.

The District points to various factual and legal defenses in order to defeat the claims, asserting that properly-conducted assessments do not establish eligibility for special education under the law. It argues that the steps it took during his time as a student at Knolls were more than adequate to meet the child find obligations. It therefore requests a resolution in its favor.

*A. The Parties and Jurisdiction:*

1. Student is a 12-year old boy who lives within the District. As noted above, he attended Knolls, from September 1999 until sometime in February 2004. He was not found eligible for special education services during that time, although he did receive speech and language services from January through October, 2002.

2. This proceeding commenced in May 2004, when Student’s parents requested a due process hearing. That request was filed with the Special Education Hearing Office (SEHO), and jurisdiction over the matter transferred to OAH after July 1, 2005. Prior to that transfer, the case had not moved forward, in that Student’s former attorney had asked that the matter be taken off-calendar shortly after the proceeding was instituted. In March 2005, SEHO gave notice that due to inactivity, the matter would be dismissed unless other action was taken. Student’s parents asked for more time, as they were obtaining new counsel, and the parties participated in mediation in May 2005. After that mediation was unsuccessful, Student’s attorney requested that the matter go back on calendar, and the hearing dates were set, along with pre-hearing conferences.<sup>1</sup>

3. By the time the hearing commenced, the issues to be tried had been defined as follows:

During the school years 2002-2003, 2003-2004, and 2004-2005, and each of them, did the District deny the Student a Free and Appropriate Public Education (FAPE), by failing to:

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<sup>1</sup> The case bore SEHO number SN-0401140. The findings here are based on records in the OAH file, of which notice is taken, as they were not made part of the exhibits.

(A) meet its child find obligations to identify and assess Student's exceptional needs;

(B) assess Student in all areas of suspected disability;

(C) identify Student as eligible for special education under the category of specific learning disability.

Further, Student raised the issue of whether he was entitled to compensatory education and services in the form of reimbursement of tuition and costs for a private school, in 2004 and 2005, and continued placement of the student through the 2005-2006 school year. Resolutions proposed by Student included a finding that he was eligible for special education due to a specific learning disability, and payment of tuition and costs at his private school, for past tuition, and through the 2005-2006 school year.

4. There is no dispute that jurisdiction was established to proceed in this matter.

*B. Student's Educational History:*

5. Student was six years old when he started kindergarten, because his parents decided to hold him out of school for an extra year. During kindergarten he did not meet all kindergarten benchmarks, but he was recommended for advancement into the first grade. (See Ex. 22, p. 138, under "3<sup>rd</sup> Trimester Report".)<sup>2</sup> Thus, whereas the progress report for the second trimester stated that Student needed to be able to name/recognize the alphabet by June, he was not able to do that completely by that particular deadline. (*Ibid.*) Although he exhibited the inability to completely meet all the kindergarten benchmarks, school staff did not recommend special education assessments or special programs, aids, or supports. That was not the case, however, during the first grade; Student's first-grade teacher recommended that he receive some after-school tutoring, and so as part of an effort to obtain that extra help, his parents had him assessed at Sylvan Learning Center in Simi Valley (Sylvan).

6. The assessment at Sylvan, performed in March 2001, used CAT/5 achievement tests. In the areas of vocabulary and reading comprehension Student showed grade equivalents of .8 and .9; the percentile rankings were seventh for vocabulary, and eleventh for comprehension. (See Ex. IIII; see Ex. JJJJ for more details.) During the first grade the District took some steps to remediate poor academic performance, by convening a Student Study Team—Retention (SST-R). The purpose of that group was to review the child's performance, with an eye toward retaining him—having him repeat first grade. Ultimately, the team recommended retention, and in the meantime a reading intervention program was recommended for Student and provided to him. (See Ex. D.)

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<sup>2</sup> The District's exhibits, identified with numbers, were not internally paginated. However, all had been Bates-stamped, sequentially through the exhibits. When necessary for identification, that number shall be used following the Exhibit number. Thus, the page cited here, although the first page of Exhibit 22, will be page 138.

7. Student's family decided not to hold him back from the second grade; in their minds he had already been held back once. However, they did hire a tutor to work with the boy during the summer session between first and second grade, and he attended summer school during that period. For summer school, he was placed in a special education classroom but did not thrive there because he was placed with students who had emotional disturbances or physical disabilities, and those children made him uncomfortable.

8. During the second grade (2001-2002) Student was provided with additional reading instruction—labeled reading intervention—for 10 weeks. He also received speech and language services because of some problems with articulation. His parents came to believe that the speech services were holding him back because that therapy required him to leave class to receive the speech services. They therefore asked that the speech services be terminated, in October 2002.

9. (A) Student took state-mandated standard achievement tests during the second grade. These tests, known as STAR tests (Standardized Testing and Reporting) are designed to show how a child is meeting (or not meeting) the state's academic standards, and they also provide a comparison to the performance of other children across the nation. (See, *e.g.*, Ex. 11, p. 104.)

(B) The test for the second grade was administered in April 2002. It revealed that Student's performance was "below basic" in the areas of English language arts and math. (Ex. 11, p. 104.) The state target is two categories above that performance, *i.e.*, "proficient", with the highest level labeled as "advanced." It is noteworthy that Student scored 290 in the English-Language Arts section, and 281 in the Mathematics portion of the testing, where a score of 300 to 349 would place him the basic range, and a score of 350 to 401 would place him in the proficient range.

(C) Compared to other students around the nation, Student was at or above the 45th percentile for most areas, but not all areas. His total reading score was at the 58th percentile, and his total math score was at the 45th percentile. Subtests in the reading area ranked as high as 66th percentile for "word study skills," with the low score, in reading comprehension, at the 45th percentile. Where the score for math procedures was at the 63rd percentile, his problem-solving math skills were at the 36th percentile when compared to other children around the country. His overall language score was fairly low, however, being at the 15th percentile. (Ex. 11, p. 106.)

10. (A) Student's report card for the second grade reveals that he was achieving below grade standards for significant parts of the school year in key academic areas such as reading and writing. The school was using a numerical grading system where a grade of 1 meant that the standard had not been met, a 2 meant that the student was progressing toward the standard, a 3 meant that the student met the standard, and a 4 meant that the student had exceeded the standard. During the first and second trimesters Student generally received a 2 in all academic areas. However, by the third trimester he had received a 3 in most areas.

(B) Although Student was graded as meeting the learning standards in most areas by the end of the year, his report card shows that in each trimester, including the last trimester when his grades were the best, he was in danger of retention. (Ex. 18, at 121.)

(C) The comments by Student's second grade teacher, set out in his report card, indicate that he started the year unable to "read/decode" second grade work, but that he made progress through hard work and support at home. By the second trimester he could read second grade material if he had some assistance. The teacher's comments indicate that the child showed some anxiety, and lack of self-confidence. He was encouraged to stop worrying, and to practice his skills over the summer vacation. (Ex. 18, at 121.)

(D) Teacher comments set forth in progress reports generated during the second grade illuminate the fact that Student, despite his hard work, needed significant attention and support in order to progress and succeed. For example, the comment from May 2002, the third trimester, set as school goals "continued small group & 1:1 support and instruction; move to 3rd grade next year with note to new teacher." (Ex. 19, at p. 122.) It is also noted that summer school was offered at a May parent-teacher conference.

11. Student did not attend summer school between the second and third grade. He was tutored, however, during the summer period. His second grade teacher was also his third grade teacher, as his new class was a mix of second and third grade students, student being a part of the third-grade contingent. Although Student's grades ranged from a C- to a B+ during the third grade, he continued to have problems with his reading, writing, and spelling. However, by June his teacher reported that he had met the standards for decoding and vocabulary, and had fallen one correct answer short of the mark in reading comprehension. (Ex. 17, p. 117.) There was no indication that his parents were warned about possible retention.

12. STAR testing was again administered, during the spring of 2003. In these tests Student met the basic levels of proficiency for both English-Language Arts and Mathematics, an improvement over the prior year. (Ex. 10, p. 102.) National comparisons revealed that Student was in the 56th percentile in reading and the 49th for math, but language scores placed him in the 26th percentile, and he was in the 33rd percentile for spelling. (*Id.*, p. 103.) Thus, he was average in two categories, and below average in two others, at least as compared to other children around the nation.

13. Student entered the fourth grade at Knolls in 2003, and for the first time in two years had a new teacher, Ms. Gallagher. He was removed from school by his parents in February 2004, part way through the fourth grade. (Ex. 13.) They removed him because they perceived poor academic progress, and because he was exhibiting signs of stress from school. Mother and Father made a written request for an assessment for special education services, but the District refused to perform an assessment, citing his average grades and performance on the STAR tests. (See Exhibits 13, 14, and 15.)

14. (A) Student did receive a report card for two trimesters of the fourth grade. Although he did not complete the second trimester, according to his teacher he had attended enough days that a report card could issue for that second period. (See Ex. 16.) The report card reveals that Student was receiving C's in all areas, except for science, where he received a B- for each trimester. He was graded as meeting expectations as far as the effort he was putting out. In the areas of reading, writing and grammar, speaking and listening, math, history and social studies his teacher marked him as needing "additional support" for standards. For example, in both trimesters, he was deemed as needing additional supports in mathematical reasoning as well as algebra and functions. The same applied to "critical thinking skills" in connection with the area of history and social studies, and in "uses the conventions of writing consistently." During the first trimester the record shows the teacher believed he needed additional supports in other areas, as well.

(B) Two written comments were generated by the fourth grade teacher on the report card. The first, for December (at the end of the first trimester), stated that Student was a conscientious student whose lack of self-confidence was hampering him in school. His teacher then commented that he needed to be in school every day and should not miss instruction. The comment relative to the second trimester—from March 2004—stated he worked to the best of his ability, was willing to ask questions when having trouble, and that Student was capable of insightful observations when interested in a topic. The teacher again commented on his absences and the effect of such on school performance. (Ex. 16, p. 115.)

(C) The report card indicated that Student missed seven days in the first trimester, and had missed twelve days as of February 11, 2004, during the second trimester. (*Id.*)

15. (A) After he left Knolls, Student was home-schooled for several months. Parents hired Karen Schnee, an educational therapist, to work with the boy. He later enrolled in Summit View, a private school certified as a non-public school, in July 2004, after Ms. Schnee recommended that school. Through the first three quarters of the fifth grade, Student received grades ranging from "satisfactory" to "outstanding" at Summit View, and his grades improved in each of the three quarters, so that all but one grade was either an "outstanding" or "good" by the end of the third quarter. (Ex. NNNN.)

(B) Summit View administered the Stanford 9 achievement tests in March 2005, when Student was in the fifth grade. The test results showed grade equivalents as low as 4.1, and as high as 12.3; the percentile rankings ran from the 28th percentile to the 91st percentile. On the important "total reading" domain, his percentile rank was 41st (grade equivalent 5.2), while the total math score was higher, with a grade equivalent of 6.3 and a percentile rank of 56th. His score in science was the highest, placing him in the 91st percentile, with a grade equivalent of 12.3.<sup>3</sup> (Ex. PPPP, p. 6.)

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<sup>3</sup> His grades in science were his strongest as well. See Ex. NNNN, second page.

*C. The District's Child Find Efforts:*

16. Student asserts that the District failed in its “child find” duties, that is, failed to fulfill its legal obligation to seek out those children within its borders who might be in need of special education services, to assess whether such services were necessary, and to take steps to provide services if necessary. As found above, a request for special education assessment was made by Student’s parents in early 2004, and refused. (See Exhibits 13-15.) However, assessments were subsequently performed by the District, apparently to resolve the due-process proceeding that was instituted after the refusal to perform assessments. Those subsequent assessments are part of the record in this proceeding.

17. (A) To be sure, the District did provide special education services to Student during 2002, when he was in the second grade, the speech and language services previously mentioned. According to an Individualized Education Plan (IEP) document based on a meeting date of January 8, 2002, he was deemed eligible as “speech/language impaired” because of articulation problems, specifically substitution errors in three areas. The IEP document states that he was assessed on the day of the meeting. (Ex. 4.) However, separate assessment documents or reports are not found in the record, and the record reveals a subsequent request by District staff for such information that was unsuccessful. (See Ex. 3, p. 11.)

(B) Although the speech and language services had been slated for one year, with an annual IEP review to take place on January 8, 2003 (Ex. 4, p. 12), the services terminated early, in October 2002. The “exit IEP” is found at Exhibit 3 and is dated October 8, 2002. The second page of that IEP document reveals that Student’s parents were requesting a discontinuance of the services. There is no indication of whether the District staff voiced any objection to that decision, and what, if any, assessments of performance had been made that would impact the decision. It only appears that the services were discontinued. (*Id.*, p. 9.)

18. After the District stopped providing speech and language services, no other special education services were provided to Student. No assessments were conducted before those that were performed in 2004, prior to this proceeding. During the approximately two years after the termination of speech services, the Student demonstrated weaknesses in some areas of academic performance, and also demonstrated a significant amount of stress in connection with school attendance. At the same time he was missing a significant number of days of school, and there was some evidence that his missed school time was stress-related. Further, there was some information available to the teachers that his absences were a function of stress. However, no referrals for assessment were made by any of the District staff; it was the parent’s request in February 2004 that ultimately led to assessment of potential need.

19. The District provides training to teachers so as to teach them to identify children who may have special education needs. According to Ms. Gray, Student's second and third grade teacher, such training was provided on a yearly basis. As Ms. Gray understood procedure, a student was to be referred for special education where there was no progress with standard interventions. That is, the teacher was to attempt to use typical interventions to make progress, and if such steps did not work, the teacher was to access the Student Study Team (SST), and if the SST could not help, then a decision would be made as to whether or not the child should be assessed for special education. On the other hand, the fourth grade teacher, Ms. Gallagher, attested that a referral for special education assessment was not deemed necessary and would not be made unless a student was functioning two years, or two grade levels, below his or her current placement in at least one core area, such as math or reading.

20. (A) Ms. Gray perceived that Student was making academic progress in both the second and third grade, even though he was struggling in some areas. While he especially struggled in reading, she attested that he ultimately met the requirements for promotion into third grade. She attested that there was no pressure to avoid assessment of children who, potentially, were eligible for special education, but at the same time instructors were not to use a special education assessment as a first step. Ms. Gray did not believe that special education was one of the steps that needed to be taken in order to allow Student to access his education. Likewise, Ms. Gallagher, who had experience in the matter of special education assessment, did not believe that he needed special education services.

(B) Ms. Gray's testimony regarding Student's progress and her perception of it is corroborated by the report cards she issued, and the comments she made on them. Those documents were generated before this proceeding, and long before the first request for an assessment, and they show that with some effort and intervention the boy could make average marks, and that he was making academic progress. Likewise, his performance on the two STAR tests, and especially the STAR test administered during the third grade, indicate academic progress. At the same time, the grades for the first trimester of the fourth grade, and the comments made by his teacher on the report card for that period also pre-date the removal of Student from school and the demand for assessment. Thus, they tend to be consistent with Ms. Gallagher's testimony regarding her perception of Student's progress.

21. (A) Student missed many days of school while attending Knolls, especially in the third and fourth grade. During the second grade, Student was absent eight days; four in the first trimester, and four more in the second. (Ex. 18, p. 121.) This increased to 19 total days in the third grade; eight in the first trimester, four more in the second, and then seven more in the last trimester. (Ex. 17, p. 117.) During the fourth grade, Student missed seven days during the first trimester, and five more during the abbreviated second trimester. (Ex. 16, p. 115.)



(B) Student's parents, and especially his mother, reported to the teachers that many of his absences were due to stomach and digestive problems, including diarrhea and vomiting. (See, e.g., Ex. M., first page; Ex. N, first page.) Student's mother is a registered nurse, and she came to believe that these symptoms might be stress related. She had Student's pediatrician examine the boy, and the doctor could find no physical explanation for these symptoms, except perhaps, stress related to school. (See Ex. QQQQ.) The teachers were on notice that Student's problems might be stress-related or in some way psychosomatic; they indicated such in response to the BASC questionnaires submitted to them by the school psychologist, Mr. Priebe, in 2004. On those questionnaires, Ms. Gray and Ms. Gallagher both rated Student in the 90th percentile for somatization, and both rated him in the 99th percentile for anxiety. Also, those teachers rated him very high in terms of a tendency to withdraw, at the 95th percentile. (See Ex. 5, p. 28.)

22. Ms. Gray and Ms. Gallagher were on notice from the parents that Student was being tutored during the school year, and during the summer, and that he was having difficulty with his homework in any event. Put another way, the teachers had notice that with extra supports in place from the home, Student was making average grades, at best.

23. Despite indications that Student was struggling to make average to low-average grades, and despite indications that school attendance created stress and anxiety in the boy, neither Ms. Gray nor Ms. Gallagher believed that Student was potentially in need of special education services. Hence, they did not refer him for assessment between the time that his speech services terminated and his removal from Knolls in February 2004.

#### *D. Assessments of Student's Abilities and Academic Achievements:*

##### *Summary of Formal Assessment Process and Results:*

24. Student's parents and the District undertook assessments of the Student's abilities, academic achievements, and potential disabilities. The assessment process began in earnest in the spring of 2004. Parents had the boy assessed by Ms. Karen Schnee, a speech and language pathologist who is also an educational therapist; she had been providing home schooling to Student. Parents also had Student assessed by a psychologist, Jonathan H. Greene, Ph.D. The District's effort was led by Daryl Priebe, a school psychologist, although tests and examinations were performed by others, including a speech and language therapist, Ms. Monica Mallue, and an occupational therapist, Ms. Elaine M. Keeler. Some testing was performed by Christine O'Brien, a special education teacher.

25. (A) Ms. Schnee conducted extensive testing during March and April, 2004, on five separate dates during that period. In terms of testing instruments, she utilized two instruments to assess Student's IQ: The Woodcock-Johnson III, Cognitive (WJ-COG), and the Leiter-R International Performance Scale, Revised (Leiter-R). She used one instrument to examine his memory capacity, and two to assess academic achievement. Two tests were used to examine auditory processing, and one each to look at phonological awareness and language. (See Ex. SS.)

(B) Ms. Schnee concluded that Student is of average intellectual ability, and that he presents with “Specific Learning Disabilities in the areas of Basic Writing Skills, Spelling, Reading Comprehension and Math Fluency.” (Ex. SS, p. 1.) She went on to report that Student manifested “intra-cognitive discrepancies” in processing speed, long-term memory, and cognitive fluency. Regarding the learning disorders, she asserted there was a discrepancy between his intellectual ability and his performance in the enumerated areas. She found that Student would need specialized services.

26. (A) Dr. Greene performed assessments on several days over a period of several months, between July 2004 and March 2005. Cognitive function was assessed in September 2004 and achievement and attention in March 2005. (See Ex. UUU, p. 1-2.) Dr. Greene determined that Student has a learning disability as defined by California Education Code section 56337. (*Id.*, p. 2.)

(B) Dr. Greene utilized the Wechsler Intelligence Scales for Children, Fourth Edition (WISC-IV) to assess Student’s intelligence, and the Wechsler Individual Achievement Tests (WIAT-II) to measure academic achievement. Further, he tested to rule out attention deficit disorders, and concluded that Student does not suffer from such disorders.

27. Mr. Priebe, the District’s psychologist, observed Student at his private school, and conducted several tests, including IQ testing that utilized parts of the WISC-IV and the Differential Ability Scales (DAS), and portions of the WJ-C. He used the Behavior Assessment System for Children, a questionnaire-type instrument that gathers information from third parties, such as teachers and parents. Parts of various achievement tests were utilized, as well as the Developmental Test of Visual Motor Integration (VMI). As part of the assessment process, Mr. Priebe observed Student at Summit View. He also obtained input from Ms. Gallagher and Ms. Gray, Student’s current teacher at Summit View, by giving them written questionnaires about the Student, which these teachers answered.

28. A speech and language evaluation was performed by Ms. Monica Mallue in August 2004 and Ms. Kealer, a registered occupational therapist, conducted an occupational therapy assessment of Student in late September, 2004. Neither the speech therapist nor the occupational therapist concluded that Student was eligible for special education.

29. (A) Mr. Priebe generated a report which set forth his conclusions that Student was not eligible for special education, assessing for eligibility under three possible categories: specific learning disability, other health impair, or emotional disturbance. (Ex. 5, pp. 15-17.) His report and analysis were based not only on the District’s assessment efforts, but on information gleaned from Ms. Schnee’s report, various observations, and school records. However, Mr. Priebe did not have access to Dr. Greene’s report at the time he completed his report on September 30, 2004. (Ex. 5, p.2.)

(B) Regarding a potential SLD, Mr. Priebe concluded that there was not a discrepancy between Student's IQ and his achievement, or one that is legally cognizable. Mr. Priebe found that Student's full scale IQ was 94, while Ms. Schnee found an IQ of 100. Mr. Priebe pointed out that standard scores on academic testing, as well as other instruments, did not demonstrate a legally-significant discrepancy between his cognitive abilities and his performance, as that discrepancy must be the equivalent to one and one-half standard deviations, or 22.5 points. Recognizing that Student did display anxiety in connection with some school-related activities, Mr. Priebe concluded that his symptoms did not rise to the level of an emotional disturbance, and the category of other health impaired did not encompass the symptoms that were seen in Student.

*The Student's Cognitive Ability:*

30. As noted above, different assessors, using different instruments and analysis, reached conclusions about Student's cognitive ability, and those conclusions differed substantially. Dr. Greene set Student's IQ at 117; Mr. Priebe found it to be 94, and Ms. Schnee set his IQ at 100.

31. (A) Dr. Greene reported that Student's "unique set of thinking and reasoning abilities make his overall intellectual functioning difficult to summarize by a single score on the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV). His nonverbal reasoning abilities are much better developed than his verbal reasoning abilities." (Ex. UUU, p. 3.)

(B) Student scored a 99 on the Verbal Comprehension Index (VCI), a completely average score. On the Perceptual Reasoning Index (PRI), his score was significantly higher—117, more than a standard deviation higher than the VCI. This led to a Full Scale IQ of 108. He scored at 97 on the processing speed index. (*Id.*)

(C) Dr. Greene administered the WISC-IV in several sessions, on three different days, a fact not clearly disclosed in his report, but explained during his testimony. He had the benefit of reviewing Ms. Schnee's report, which noted some processing problems, and he understood that Student could exhibit anxiety. He therefore attempted to minimize the boy's anxiety, and was trying to obtain the best possible performance so as to obtain the best picture of the Student's abilities.

(D) Dr. Greene asserted that the PRI score of 117 should be used as the measure of Student's IQ, rather than the Full Scale Score of 108. In testimony, he explained that the manual for the WISC-IV allows for such a departure in appropriate circumstances, and that in this case such circumstances existed.

(E) District's psychologist, Mr. Priebe, reviewed the WISC-IV testing materials utilized by Dr. Greene. He opined that Dr. Greene, in scoring the test, had made three errors. At the request of the ALJ he calculated the proper score, assuming that there were in fact such scoring mistakes by Dr. Greene. According to Mr. Priebe, Student's score on the PRI portion should have been 112, and the Full Scale IQ score should have been 105. (See Ex. 40.)

32. (A) Ms. Schnee had performed cognitive testing some five to six months before Dr. Greene did so. She first administered the WJ-COG, which yielded a low average score, 89. However, because she concluded that Student suffered from certain memory processing and language deficits, she administered the Leiter-R, because it is a nonverbal test; even the directions are given nonverbally. The results were in the middle of the average range, the Full Battery standard score being 100. (Ex. SS, p. 3.)

(B) Ms. Schnee testified that she is licensed in California as a speech and language therapist, and is board-certified as an educational therapist. She also attested that she can not test IQ without a psychologist “signing off” on the results, which did not happen in this case. In Student’s Closing Argument, he asserts that in fact Ms. Schnee’s license allows her to assess intelligence if done in connection with her activities as a speech and language therapist. As discussed further below, this argument is accepted, and her findings and testimony regarding the Student’s cognitive ability are not discredited because a psychologist did not sign off on her testing.

33. (A) Mr. Priebe did not administer any of the usual IQ tests, such as the Wechsler or Stanford-Binet. Instead, he used the Differential Abilities Scales to assess Student’s cognitive ability. In that testing, Student’s “general cognitive ability” was a standard score of 94, with verbal reasoning at 103, nonverbal reasoning at 92, and spatial processing at 91. (Ex. 5, pp. 22, 23.) Mr. Priebe attested that he used the DAS because, in his opinion, it is good for the diagnosis of learning disabilities, and tends to separate out processing difficulties. He also asserted that the general cognitive ability score yielded by the test is comparable to an IQ score.

(B) Though not completely clear from his report, it appears from his testimony that parts of other intelligence tests were utilized by the District in the assessment process. However, they did not yield full scale IQ scores.

34. As the foregoing demonstrates, three experienced clinicians obtained several different indicators of Student’s cognitive ability—scores of 89, 94, 100, 105 (corrected from 108), and 112 (corrected from 117). Ms. Schnee’s rationale for discounting the score of 89 derived from a traditional instrument is reasonable in the circumstances and at the same time, the Leiter-R is a recognized IQ test. Dr. Greene’s explanation for using one part of the results of the WISC–IV test, rather than the full scale score is certainly not explained in his report, and the explanation given at the hearing is strained at best. While he testified that the manual allows for use of the PRI score, in compelling circumstances, it was not demonstrated that compelling circumstances existed. When looking at the remaining scores of 94, 100, and 105, the score of 100 yielded on the Leiter-R by Ms. Schnee’s testing is accepted as a fair measure of Student’s IQ.

*Assessments of Potential Psychological Processing Disorders:*

35. (A) Ms. Schnee administered several instruments designed to discover possible processing disorders. She sought to assess his memory abilities by using the WJ-COG and WRAML. She also utilized the SCAN-C and TAPS-R to test aspects of auditory processing.

(B) Ms. Schnee's testing showed a significant discrepancy between Student's short-term memory and his long-term memory; his short-term memory standard score was 103, while long-term was a score of 74. The difference is slightly less than two standard deviations. (Ex. SS, p. 3.) His working memory score was 97, right in the average range. Ms. Schnee then turned to the WRAML2 (Wide Range Assessment of Memory and Learning, Second Edition) to further test Student's memory capacity. In this testing another 29-point discrepancy was found, with his visual memory index score at 109, and his verbal memory index being an 80. A working memory score was 94, consistent with the results of the WJ-COG.

(C) According to Ms. Schnee, the implications of these test results are that the Student will tend to be a "visual" learner, and that teaching strategies will have to be modified to use his stronger memory skills, and to build up his long-term memory.

(D) Tests of auditory processing reveal that Student's hearing is within normal range for both ears. However, on some testing his right ear was dominant or preferred; in the competing words subtest, his standard score was 10 using the right ear, but a 4 when using the left ear. Ms. Schnee describes this as an unusual differential. Somewhat less disparate results followed from the competing sentences test, where the standard score for his right ear was a 10, and for his left ear was a 7. These results were obtained using the SCAN-C Test for Auditory Processing Disorders in Children. (Ex. SS, p. 4.) The Composite Standard Score yielded from this testing was a 98, clearly in the average range. (*Id.*, p. 16.)

(E) When Student was assessed with the TAPS-R (Test of Auditory Perceptual Skills, Revised), a standard assessment tool designed to measure auditory perception, he received an Auditory Perceptual Quotient of 94, within the average range. Subtests scores showed some scatter, as he placed in the "bright average" range on two subtests, (auditory processing and auditory discrimination) while obtaining low scores in auditory number memory, forward and reversed. Indeed, the lowest subtest score was in auditory number memory, forward, where he placed in the fourth percentile; the next lowest subtest score in number memory reversed, where he placed in the twenty-first percentile. (Ex. SS, p. 18.)

36. As noted above, Ms. Mallue conducted a speech and language evaluation for the District on August 24, 2004. She administered the Comprehensive Assessment of Spoken Language (CASL), which she described in her report as an in-depth evaluation of the oral language processing systems. The Student's "core language score" was a 91 (standard

score), placing him in the 27th percentile. Subtest scores scattered, his highest subtest placing in the 73rd percentile, and the lowest in the 8th percentile. (Ex. AA, p. 1.) It should be noted that these scores were higher than those obtained by Ms. Schnee when she administered the CASL some months before.<sup>4</sup>

37. When Ms. Kealer, a registered occupational therapist, conducted an occupational therapy assessment of Student in late September, 2004 for the District, she administered several tests. She concluded that Student had adequate abilities during fine motor tasks, and that he was within the average range for visual motor integration and visual perception. As to his writing, she found that legibility was hampered by poor letter formation and hasty writing speed. (Ex. BB, p. 3.)

*Academic Achievement Tests:*

38. (A) Aside from the STAR tests administered to Student during the school year, various professionals administered standardized achievement testing as part of the assessment process. Ms. Schnee was the first to do so, and she utilized the Woodcock-Johnson III Achievement Test. Student's scores, at least as to the subtests, demonstrated some scatter, with one especially low score. However, the vast bulk of the Cluster scores placed him somewhere in the average range. For example, the standard score in Broad Reading was an 87, low average. Likewise, his Broad Writing standard score was an 86. The lowest of the cluster scores was in Basic Writing Skills, at 84, placing him in the 14th percentile in that category. On the other hand, many scores were at or slightly above average, including Broad Math, a 98 and Oral Expression, at 104. Academic Applications was placed at 96, and Math Reasoning at 100. (Ex. SS, p. 16.)

(B) In the subtest scores, the lowest standard score was a 75, in math fluency, placing him in the fifth percentile. As Ms. Schnee noted, this was juxtaposed against a score of 110 in the Applied Problems subtest, which placed Student in the 75th percentile. Overall, most of the subtest scores fell between 83 and 96, with four at 100 or higher. (Ex. SS, p. 15-16.)

39. Dr. Greene utilized the WIAT-II to test Student's academic achievement. This testing was performed March 23, 2005. (Ex. UUU, p. 9.) The following standard scores were rendered: Reading Composite, 92; Mathematics Composite, 92; Written Language, 86; Oral Language, 93. (*Id.*) Subtest scores generally fell into the range of 92 to 100; the lowest score was in spelling, a standard score of 81. Only one of the other nine subtest scores fell into the 80's: Word Reading, an 89. The other seven scores were between 92 and 100. (*Id.*, p. 21.)

40. Ms. O'Brien administered achievement testing. The results are not organized neatly into a table, nor are they the subject of a separate report. Instead, they are reported in parts of Mr. Priebe's report. (Ex. 5.) The standard scores include an 84 in Reading

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<sup>4</sup> This led to differing contentions regarding the potential "practice effect" on the results, a issue explored below.

Comprehension; an 86 in Spelling, and an 80 in Math Computation.<sup>5</sup> A 97 was yielded in reading decoding, and a 104 in written language.<sup>6</sup>

41. (A) Ms. Schnee performed other tests that she placed under the heading of academic achievement. These include the Test of Written Language—3 (TOWL—3) and the Comprehensive Test of Phonological Processing (C-TOPP). She administered the Comprehensive Assessment of Spoken Language (CASL) as well.

(B) The results of the TOWL testing brought a standard score of 89 on the Spontaneous Writing Composite. One subtest yielded a score of six, in the low average range, while the other score was a nine, for Contextual Language. According to Ms. Schnee, the first subtest indicates poor punctuation and capitalization skills, the latter puts him close to average for syntactic ability. His Story Construction score was average. (Ex. SS, 7.)

(C) The results of the C-TOPP testing placed Student, overall, in the low average range, as his composite score was an 89, at the 21st percentile. One subtest that looks to phonological memory yielded a standard score of 85, and the rapid naming subtest brought a score of 79. Two other subtests yielded low scores: Rapid Picture Naming (76) and Retrieval Fluency (67). (*Id.*, pp. 7-8.) Ms. Schnee found the results of the C-TOPP especially significant, as she interpreted the results to indicate a lack of phonological development, which can impact reading.

(D) The results on the CASL, according to Ms. Schnee, indicate low to average scores in tests pertaining to language ability, although the Core Composite score—the global measure of language performance—was an 89, low average. (See Ex. SS, at p. 20.) One subtest score was especially low, a 70 in the area of nonliteral language, which assesses the ability to comprehend and explain the meaning of spoken utterance where the literal meaning does not convey the message, such as with figurative speech and sarcasm. Five other subtests scores were relatively low, with rankings between the ninth and sixteenth percentiles. (*Id.*)

(E) When Ms. Mallue, the District’s speech and language specialist, administered the CASL, Student’s scores were significantly higher. However, she gave the test within six months of Ms. Schnee’s administration. These higher scores may reflect a practice effect, and in the circumstances are given little weight.

42. Student’s performance on standardized achievement tests show that overall, he is in the average range, though perhaps toward the low side. At the same time, he exhibits some significantly low performance in isolated areas. While there was testimony that most

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<sup>5</sup> Mr. Priebe in his report states this was an invalid score and should have been a 90 because Student made three errors or mistakes because he added on three subtraction problems. This claim is rejected; there could be many reasons why a student would produce such wrong answers. The answers are wrong, and it makes little sense to allow the scores to be changed through some “insight” of the assessors.

<sup>6</sup> These results are obtained by comparing the information on page 23 of Ex. 5 with the chart on page 25, where scores obtained by Ms. O’Brien are shown in one column. See also, pages 26 and 27.

people, when tested in this manner, will show strengths and weaknesses, some subtest scores were especially low, *i.e.*, in the bottom five percent. And, Ms. Schnee was able to demonstrate that Student shows such weakness in some areas of memory, writing, and math performance.

43. Notwithstanding Student's weaknesses, it was not demonstrated that his achievement on standardized tests runs one and one-half standard deviations below his cognitive ability. Here his cognitive ability is found to be 100, but his achievement tests do not show scores that are some 22 points below that line, *i.e.*, scores of 78 and lower.<sup>7</sup> Indeed, it has to be acknowledged that the results obtained from the independently-administered achievement tests have not yielded results in the range of 78 and below, except on various subtests, which scores are not controlling in the analysis.

*Credibility of the Witnesses:*

44. For the most part, all the witnesses were credible in terms of their demeanor while testifying. Minor issues, such as the tendency of Dr. Greene and Priebe to rather expand their answers, did not diminish from their credibility in terms of their demeanor. That being said, this tendency did, at times, undercut the credibility of their analysis, in that it appeared that these two witnesses were anxious to maintain their positions.

45. In terms of expertise among the key expert witnesses, all have sufficient education, training, and experience. However, it must be said that Dr. Greene's report did not show him in the best light. It left unexplained, and unsubstantiated, as much as it did explain or substantiate. For example, there is no explanation as to why he determined to use the PRI score as Student's IQ, rather than the Full Scale IQ score, and the subsequent explanation at hearing was less than persuasive. Mr. Priebe's report was better, yet it was also lacking some information, or at least it was unclear as to where information came from and its significance. The best of the reports was Ms. Schnee's, which clearly set out what she did, and why she did it, and it appeared to provide the information gleaned from all the test instruments. Mr. Priebe's does not do that, and it appears there may be data generated by the testing process that is not set forth; Dr. Greene's report is not clear about ADHD testing and its results. Nor does it disclose, as his testimony did, that the IQ testing occurred over several sessions. If Ms. Schnee's conclusion that Student suffers from a learning disorder is not followed here, it is not a criticism of her efforts in this matter; it is a disagreement, legally driven, as to where the data must lead.

46. Overall, Student's teachers, past and present, appeared credible in their demeanor, recall, and expertise. While the current teachers have different perspectives on Student's needs and skills than his former teachers from Knolls, overall that did not diminish the credibility of the public employees who instructed Student in the past. They appeared as caring individuals dedicated to their profession, and as truthful during the hearing. Likewise,

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<sup>7</sup> It was agreed by all the experts that in the pertinent tests, a standard deviation is 15 points, hence one and one-half standard deviations would be 22.5 points.



while Student's mother would certainly want the best for her child, she was credible in her demeanor and consistent in her testimony regarding the problems Student, and his parents, have faced during the first six years of his formal education.

## LEGAL CONCLUSIONS

### *A. Legal Conclusions Common to All Claims:*

#### *The General Principles of IDEA:*

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs ...." (20 U.S.C. § 1400(c).)

2. "Free and appropriate public education" means special education and related services that are provided at public expense, that meet the state educational agency's standards, and conform with the student's individualized education program. (20 U.S.C. § 1401(8)(A)-(D).) "Special education" is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)

3. The educational agency may be required to provide "related services", denominated as "designated instruction and services" (DIS) in California. Such include developmental, corrective, and supportive services that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(22); Ed. Code § 56363.)

4. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities with a "basic floor of opportunity." (458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit. As stated by the Second Circuit Court of Appeals:

Plainly, however, the door of public education must be opened for a disabled child in a "meaningful" way. *Board of Educ. v. Rowley*, 458 U.S. at 192. This is not done if an IEP affords the

opportunity for only "trivial advancement." *Mrs. B. v. Milford Bd. of Educ.* 103 F.3d at 1121 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988). An appropriate public education under IDEA is one that is "likely to produce progress, not regression." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (3d Cir. 1997) (internal citation omitted), cert. denied, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998).

(*Walczak v. Florida Union Free School Dist.* (2d. Cir. 1998) 142 F.3d 119, 130.)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

5. Procedural errors do not necessarily deprive a student of a FAPE. There must be a substantive harm to the student, such as a loss of an educational opportunity. (See Cal. Ed. Code § 56505, subd. (j): [Hearing officer may not base a decision solely on nonsubstantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent's opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. of Trustees* (9th Cir. 1992 ) 960 F.2d 1479, 1484; *DiBuo v. Bd. of Educ.* (2002 4th Cir.) 309 F.3d 184.)

6. Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. It contains the following information:

(A) A statement of the child's present levels of academic achievement and functional performance,

(B) A statement of measurable annual goals,

(C) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided,

(D) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,

(E) A statement of the program modifications or supports for school personnel that will be provided for the child,

(F) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class,

(G) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and

(H) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

7. Student bore the burden of proving his claims against the District. (*Schaffer v. Weast* (2005) 126 S. Ct. 528.) While the *Schaffer* decision had not been announced at the time of this proceeding, such a rule should have applied in any event, based on familiar rules of evidence. (See Evid. Code, §§ 500, 664.)

8. Jurisdiction to proceed in this matter was established, based on Education Code section 56501, subdivision (a), and Factual Findings 1 through 4.

#### *On Credibility Generally:*

9. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Stevens v. Parke-Davis, supra*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence”, including a single expert witness. (*Kearl v. Board of Medical Quality Assurance, supra*, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. “The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.” (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) An expert's credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

*B. Legal Conclusions Pertaining to Specific Issues In the Case:*

*The Child Find Claims:*

10. (A) Under IDEA, States and local educational agencies (LEA's) are required to identify, locate, and evaluate all children with disabilities residing in the state. (See 20 U.S.C. 1412(a)(3), 34 C.F.R. § 300.125.) Under these provisions, commonly referred to as "child find" obligations, the States and LEA's must have established procedures that will ensure that all children with disabilities residing in the State, regardless of the severity of their disabilities, and who are in need of special education and related services, will be identified, located, and evaluated. The States and LEA's must have developed a practical method, and implemented that method, to determine which children with disabilities are currently receiving needed special education and related services.

(B) The child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade. (34 C.F.R. § 300.125(a)(2)(ii).)

(C) The child find duty is triggered when the LEA—in this case the Respondent District—has reason to suspect a disability, and reason to believe that the disability can be addressed by special education. The LEA must respond within a reasonable time after obtaining notice of the potential disability and need for special education services. (*Dept. of Ed. v. Cari Rae S.* (Dist. Ha 2000) 158 F. Supp.2d 1190, 1193-1194.) If the child's behavior or performance indicates the need for special education, then the LEA is deemed to have knowledge of that fact. (20 U.S.C. 1415(k)(8)(3)(ii).)

(D) Under the IDEA, a student's parents do not have a duty to identify, locate, or evaluate their child's disability. As stated by the Court in *Hicks v. Purchase Line Sch. Dist.* (W.D. Pa. 2003), 251 F. Supp. 2d 1250, 1253, "this obligation falls squarely upon the district. [Citation omitted.] A child's entitlement to special education should not depend upon the vigilance of parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith."

11. It was not established that the District failed in its child find duties, based on Factual Findings 5 through 14(C), 16 through 23. In this case the evidence establishes that the District had policies in place for identifying those students who may need special education. To be sure, those policies appear less than perfect; waiting until a child is achieving two grade levels below current grade level is problematic when the law recognizes that even children who are advancing grade to grade may require special education. That being said, the testimony also established that the staff receives regular training on how to identify children with special education issues, the school did provide speech and language services when Student was younger, and there are recognized steps to take when a problem is suspected. While Student was struggling and needed the assistance of tutors, that alone did not put the District on notice he might have special education needs where he was able to obtain passing grades, and improve his performance on the standardized state testing that tended to show him as an average student.

*The Claim that Student Suffers From A Specific Learning Disability:*

12. Student suffers from a specific learning disability if he has a severe discrepancy between ability and achievement in one of several areas, including reading comprehension, written expression, basic reading, math calculation, and math reasoning. (See 20 U.S.C. 1401(26); Ed. Code § 56337, subd. (a); 34 C.F.R. § 300.541.)<sup>8</sup> The learning disability must be a function of a disorder in a basic psychological process, such as attention, visual processing, sensory-motor skills, and the disorder can not be a function of environmental, cultural, or economic disadvantages. Finally, it must be shown that the discrepancy can not be corrected through regular or categorical services offered in the regular education program.

13. (A) Under the applicable California regulation—section 3030, subdivision (j) of the California Code of Regulations—intellectual ability shall be determined by a systematic assessment of intellectual functioning. (See section 3030, subd. (j)(2).) The level of achievement shall be measured by standardized achievement tests.

(B) Here there was a systematic assessment of intellectual functioning. While the persons who made those assessments obtained differing results, at bottom they acted systematically and used various standardized tests, and thus no one test impacts the

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<sup>8</sup> Both 20 USC 1401 and California Education Code section 56337 have been amended, the former effective July 1, 2005, and the latter as of October 2005. As this case was pending at the time of the amendments, the prior law will apply.

determination. As set forth in the Factual Findings, Ms. Schnees's determination that Student's IQ is 100 has been accepted. (See Factual Finding 34, see also Factual Findings 30 through 33(B).)

(C) Likewise, standardized achievement tests have been utilized to measure Student's achievements, and this has included the STAR tests as well as those standard achievement tests administered during the assessment process.

14. Where standardized tests are considered valid for the student in question, a severe discrepancy is shown by a difference (in standard scores) between the ability test scores and achievement test scores, which difference is equal to 1.5 standard deviations, adjusted by one standard error of measurement, not to exceed four points. (Section 3030, subd. (j)(4)(A).) However, that discrepancy must be corroborated by other assessment data, including tests, scales, instruments, observations, and work samples.<sup>9</sup>

15. (A) Such a severe discrepancy has not been established with the data at hand. This Conclusion is based on Factual Findings 34, 38 through 43, and Legal Conclusions 12 through 14. Here, a standard deviation is 15 points, and thus Student must demonstrate a difference of 22.5 points can be found between his IQ of 100, and his standard achievement tests. That has not happened, though he is close in some areas.

(B) Ms. Schnee's testing did not demonstrate such a differential. The lowest score demonstrated by Student in her achievement testing in terms of a broad achievement score (as opposed to a subtest score) was an 84, in basic writing skills, a 16 point difference. This is insufficient even if student's argument were accepted that an 18 point differential would establish a severe discrepancy. Some of his test scores were at or above average. (See Factual Finding 38.)

(C) Dr. Greene's testing yielded similar results, in that all broad area scores ran from an 86 to a 93. (See Factual Finding 39.)

(D) The largest differential was that shown by Student's math computation score, on the testing administered by Ms. O'Brien. That score, an 80, is close to the mark, but given Student's higher scores on both Schnee's and Greene's testing, it is discounted. (See Factual Finding 40; see Factual Finding 38(A) [Schnee testing yielded broad math score of 98]; Factual Finding 39 [Greene testing yielded math composite score of 92].)

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<sup>9</sup> Student asserted that the adjustment for the standard error of measurement was four points, but this is the maximum recognized by the regulation. The record does not so clearly show what the standard error of measurement is for the various tests, which can vary from test to test.

16. (A) Student argues that CCR section 3030, subdivision (j)(4)(C) should control in this case. That part provides that where standardized testing does not show a severe discrepancy, the IEP team may find one to exist, provided it documents such in a written report. The team in such circumstances must show a problem in one or more basic psychological disorders, and must document how severe discrepancy was established.

(B) The undersigned must decline, in this case, to substitute his judgment for that of the IEP team, which did examine this matter. Simply put, the record is just not strong enough to support the conclusions that would have to be reached about any severe discrepancy. Further, the evidence that Student suffers from a disorder in one or more basic psychological processes is not sufficient. For example, all the experts agreed that Student does not have an attention disorder, although he at times seems to have trouble paying attention. It has not been demonstrated that he has a disorder in visual processing or auditory processing, sensory motor skills or cognitive skills including association, conceptualization, or expression. To be sure, he demonstrates weaknesses in some aspects of some of these basic processes, but under the law and based on this record, it can not be found that he can be made eligible by resorting to CCR section 3030, subdivision (j)(4)(C).

17. Where it has not been demonstrated that Student is eligible for on the basis of a specific learning disability, and where it has not been demonstrated that the District has failed in it's child find obligations, it can not be found that the District failed to provide him a FAPE.

18. As it has not been demonstrated that Student has been denied a FAPE, the remedies sought by Student, such as reimbursements, can not be granted.

19. The District must be deemed to be the prevailing party on all issues. (Ed. Code § 56507, subd. (d).)

*Discussion and Rationale:*<sup>10</sup>

It can not be denied that Student has demonstrated some difficulty in consistently succeeding in a general education program. At the same time, he appears to have performed better in his current school setting. During the hearing there was sharp disagreement among the experts and teachers regarding his abilities, achievements, and educational needs. At bottom, it is fairly clear that Student is a boy whose general cognitive ability is average, or slightly below average, but whose average academic performance does not come easily. However, under the law, this does not necessarily make him eligible for special education services.

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<sup>10</sup> The section that follows is meant to provide a discussion of legal issues raised as well as key evidence, and a rationale for the findings, conclusions, and order. So far as stated, it is intended to augment credibility findings. However, the evidence and authorities referenced are not necessarily the only ones relied on in reaching the decision.

The parties confined the eligibility issue to whether or not Student was eligible as a person with a specific learning disability, and they did not explore the issue of whether he has a serious emotional disturbance or other health impairment, which had been touched upon in the District's assessment process. To be sure, the issue of Student's stress, and his physical response to school was the subject of some proof, but was not offered to prove the other potential bases of eligibility. In any event, upon a careful review of the record, it has not been established that there is a severe discrepancy between ability and performance, nor a disorder in a basic psychological process.

The only way the record could really support a severe discrepancy would be to adopt Dr. Greene's finding that Student's IQ is 117, and that can not be done. The explanation at the hearing as to why that higher number should stand, unsubstantiated by the original report and lacking clear citation to the testing manual or some other outside source, was simply not convincing. Likewise, Student's performance on standard achievement tests, while weak in some areas, generally was in the average to low-average range; it can not go unnoticed that these relatively strong achievement testing scores were the result of the family's testing.

Student appears as a boy who falls above the cut-off line for specific learning disability, but below the median. This does not make him eligible for special education at public expense, even though special education strategies might improve his performance. At the same time, the Student has not carried his burden of proving that the District failed to live up to its child find obligations, given the child's regular performance in the low average range. In these circumstances, the matter must be dismissed.

#### ORDER

The claims by Student against the Simi Valley Unified School District, not being sustained, are hereby dismissed, and the District shall be deemed the prevailing party on all claims made against it in this proceeding.

April 24, 2006

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code § 56505, subd. (k).)